(1)

Supreme Court, U.S.
FILED
04-927 JAN 5 - 2005
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No.

In the

Supreme Court of the United States

Connie Broussard,

Petitioner

v.

CITGO Petroleum Corporation,

Respondent

On Petition of Writ of Certiorari
To the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. What constitutes a different transaction for res judicata purposes?

2. Is amending the original complaint mandatory when new claims arise while the suit is pending?

PARTIES TO THE PROCEEDINGS

1. Connie Broussard, petitioner
2. CITGO Petroleum Corporation, respondent

TABLE OF CONTENTS

QUESTIONS PRESENTED..... i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES.....v

OPINIONS BELOW..... 1

DISTRICT COURT CITATION 1

APPELLATE COURT CITATION 1

STATEMENT OF JURISDICTION..... 2

STATUTES..... 3

STATEMENT OF THE CASE..... 4

ARGUMENT..... 6

A NEW CAUSE OF ACTION FOR RES JUDICATA PURPOSES 7

AMENDING THE ORIGINAL COMPLAINT 10

CONCLUSION 12

TABLE OF AUTHORITIES

Brannan v. Fowler, 100 Ohio App. 3d 577, 654 N.E.2d 434, 437 (Ohio Ct. App. 1995) 11

C.I.R. v. Sunnen, 333 U.S. 591, 597, 92 L. Ed. 898, 68 S. Ct. 715 (1948) 6

Computer Assocs. Int'l v. Altai, Inc., 126 F.3d 365, 369, 370 (2d Cir., 1997)..... 11

Griffin v. City of Dallas, 26 F. 3d 610, 612 (5th Cir. 1994) 10

Hapgood v. City of Warren, 127 F.3d 490, 494 (6th Cir., 1997) 11

Labelle Processing Co. v. Swarrow, 72 F.3d 308, 313 (3d Cir., 1995) 7

Los Angeles Branch NAACP v. Los Angeles Unified School Dist., 750 F.2d 731, 739 (9th Cir., 1984) 10

Maharaj v. BankAmerica Corp., 128 F.3d 94, 97 (2d Cir., 1997) 8

Manning v. Auburn, 953 F.2d 1355, 1360 (11th Cir., 1992) 11

Marquez v. Bridgestone/Firestone Inc., 2003 U.S. Dist. LEXIS 19661 (D. Iowa, 2003) 9, 11

Meekins v. United Transp. Union, 946 F.2d 1054 (4th Cir., 1991) 7

SEC v. First Jersey Sec., 101 F.3d 1450, 1463-64 (2d Cir. 1996) 11

Storey v. Cello Holdings, L.L.C., 347 F.3d 370, 383 (2d Cir., 2003) 8

Urrutia v. Valero Energy Corp., 841 F.2d 123, 126 (5th Cir. 1988) 11

Yinger v. City of Dearborn, 1997 U.S. App. LEXIS 33189 (6th Cir., 1997) 8

STATUTES

USCS Fed.R.Civ.P.15 9

OPINIONS BELOW

DISTRICT COURT
United States District Court
for the Western District of Louisiana
Connie Broussard v. CITGO Petroleum Corporation
No. 01-CV-1399

APPELLATE COURT
Connie Broussard v. CITGO Petroleum Corporation
No. 04-30387

STATEMENT OF JURISDICTION

The decision and opinion of the United States Court of Appeals for the Fifth Circuit was issued and filed on **October 12, 2004.** This Petition for Writ of Certiorari is filed within 90 days after the filing of that opinion and decision. The jurisdiction of the United States Supreme Court is invoked pursuant to 28 United States Code § 1254(1) providing in pertinent part:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

STATUTES INVOLVED

USCS Fed.R.Civ.P.15 9

See Appendix For Text of Statutes Involved

STATEMENT OF THE CASE

While working at CITGO Petroleum Corporation, petitioner, Connie Broussard, endured continuous sexually discriminatory treatment consisting of belittlement and harassment from her superiors and their constant refusal to train her for better positions. CITGO failed to promote her, despite the fact that Ms. Broussard's experience and qualifications exceeded those of the male employees who were trained and promoted. Due to the constant pattern of sex discrimination and harassment with CITGO that lasted throughout the final eight years of her employment, Ms. Broussard filed a claim with the Equal Employment Opportunity Commission, obtained a right to sue letter and filed *Broussard I* in June 1999. The suit, filed in state court, was removed to federal court and dismissed on summary judgment.

The discrimination, harassment and retaliation ensued while *Broussard I* was pending. CITGO trained Connie Broussard at a level lower than her less qualified male colleagues and subjected her to different, more strenuous interviews during the promotion processes.

On May 16, 2001, while the appeal in *Broussard I* was pending, Ms. Broussard was called into a meeting in a CITGO conference room. The stated purpose of the meeting was to investigate several alleged complaints of Ms. Broussard's co-workers that she was "bothering" them, requesting information she could have used in *Broussard I.* However, CITGO's human resources consultant, who conducted much of the meeting, admitted that she had never heard any of the employees complaining about being bothered and had no idea who could have made such a complaint.

The meeting turned into an interrogation concerning Connie Broussard's currently pending litigation against CITGO. It turned down her repeated requests to have her attorney, or at least a union representative, present. After more than an hour of invasive questioning about the lawsuit, Ms. Broussard finally broke under the stress. She began screaming and pounding her fists against the table until her hands bled. She was crying and shaking uncontrollably. Ms. Broussard requested that she be allowed to seek medical attention. CITGO refused to let her go, and insisted in continuing the meeting, despite the fact that Ms. Broussard was clearly physically and mentally incapable of going through any more interrogation that day.

Connie Broussard was eventually escorted to the employer's medical center, but CITGO ordered her to return to the meeting that same afternoon. Ms. Broussard refused and CITGO suspended her until further notice. On May 18, 2001, Ms. Broussard was fired, allegedly due to her misconduct during the meeting of May 16, 2001.

Connie Broussard's discharge violated CITGO's policy that an employee is terminated only after three letters of reprimand. Ms. Broussard had never been reprimanded for anything throughout her employment with CITGO. Male employees had never been fired, usually not even reprimanded, for truly egregious misconduct.

As a result of the May 16, 2001 incident Ms. Broussard filed a second lawsuit against CITGO, wherein she claims unlawful discrimination and retaliation against her for having filed *Broussard I*, as well as for false imprisonment.

The lower court, finding that Ms. Broussard was trying to re-litigate the same claims already dismissed in

Broussard I, ordered that her second lawsuit was barred by res judicata and failure to amend the original complaint. The Court of Appeals for the Fifth Circuit affirmed.

ARGUMENT

Res judicata applies to repetitious lawsuits brought on the same grounds, when a court of competent jurisdiction has already entered a final judgment on the merits of the cause of action and the parties and their privies are the same in both the original and the subsequent suit. *C.I.R. v. Sunnen*, 333 U.S. 591, 597, 68 S. Ct. 715, 92 L. Ed. 898 (1948). However, when the second lawsuit is based on "a different cause or demand," the res judicata doctrine applies only to those matters that have been subject to judgment in the first suit, and not to those "...matters which might have been litigated and determined..." in that suit. *Id.*, at 598.

Most Circuits use the transactional test in determining what represents a different cause of action for res judicata purposes. However, it is this transactional test that is not interpreted consistently among Circuits. Specifically, it is not clear whether a wrong that occurred after the first action was brought arises out of a different event or transaction, or whether it arises out of the same transaction, the employment relationship.

In Connie Broussard's case, the District Court for the Western District of Louisiana found, and the Court of Appeals for the Fifth Circuit affirmed, that CITGO's action complained of in the second lawsuit, whether retaliatory or not, arose out of the same transaction, the employment relationship between the parties, as the action complained of

in *Broussard I*, even though it occurred while *Broussard I* was pending. Therefore, Ms. Broussard's second suit was dismissed as barred by res judicata. The Fifth Circuit also agreed with the District Court that amending the original compliant is not an option, but a mandatory step that a plaintiff need take in order to bring another claim. It therefore dismissed Ms. Broussard's second suit for failure to amend the complaint in *Broussard I*. Thus, there are two issues that are of concern in applying the res judicata doctrine. One is what represents a different event or transaction. The other is whether amending the original complaint is mandatory in order for Connie Broussard to maintain her rights.

The discrepancies among Circuits as to what constitutes a different transaction, as well as whether a plaintiff has an option to amend the original complaint or bring the new claim in a separate suit, have yet to be settled by this Honorable Court. Due to the present inconsistencies and uncertainties, petitioner respectfully requests that this Court grant this petition for Writ of Certiorari.

I. What constitutes a different transaction for res judicata purposes?

The Third Circuit infers that events that occur after those creating the earlier claim may create a new claim which is not barred by res judicata. *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 313 (3d Cir., 1995).

Following the same judgment pattern, the Fourth Circuit decided, in *Meekins v. United Transp. Union*, 946 F.2d 1054 (4th Cir., 1991) that defendants' further denying plaintiffs' rights after the first suit was pending "...would

have been 'wholly speculative' " and, therefore, plaintiffs second lawsuit was not barred by res judicata because it arose out of a "...transaction separate from that on which the first suit was based." *Id.*, at 1057. The Fourth Circuit would have considered Connie Broussard's termination as being speculative at the time *Broussard I* was filed and as arising out of a different event when the second suit was filed.

By contrast, the Sixth Circuit does not distinguish between the claim that led to the first lawsuit and the claim that arose while that suit was pending. In *Yinger v. City of Dearborn*, 1997 U.S. App. LEXIS 33189 (6th Cir. 1997), plaintiff, a police officer, was declared unfit to perform on psychological grounds. He filed a suit against the city to challenge the forced psychological examinations. While the suit was pending, despite the fact that another examination found plaintiff to be fit to perform, the city denied plaintiff's right to return to work, and also denied his application for a duty officer pension. Because the city had agreed to allow him to return to his duties if a new examination would have rendered him fit to work, plaintiff brought a second suit against the city alleging discrimination and breach of contract. *Yinger*, supra. The court found that the contract, although entered into and breached while the first suit was pending, constituted a part of the same transaction that led plaintiff to bring the first action.

The Second Circuit, when analyzing the effects of the first lawsuit in *Storey v. Cello Holdings, L.L.C.*, 347 F.3d 370, 383 (2d Cir., 2003), decided that, even if both lawsuits are based on "...facts representing a continuance of the same 'course of conduct,' " the second claim is not barred by the res judicata doctrine. *Id.*, at 383. Quoting its decision in *Maharaj v. BankAmerica Corp.*, 128 F.3d 94, 97 (2d Cir., 1997) the Second Circuit stated that "...as a matter of logic, when the second action concerns a transaction occurring

after the commencement of the prior litigation, claim preclusion does not generally come into play." Even if Connie Broussard's termination occurred due to the same pattern of sex discrimination, it still represents a different event that is not barred by res judicata in the Second Circuit.

On the other hand, a plaintiff's claim that she was discharged in retaliation due to her pending discrimination suit was considered to arise out of the same transaction. *Marquez v. Bridgestone/Firestone* Inc., 2003 U.S. Dist. LEXIS 19661 (D. Iowa, 2003). In rendering its judgment, the Iowa court followed the instructions and practice of the Eighth Circuit that considers such claims as arising out of the same transaction or nucleus of operative facts.

Similar to the Sixth and the Eighth Circuits, the Fifth Circuit narrows the analysis of a new claim to the same nucleus of operative facts standard. Therefore, in the case of Connie Broussard, the Fifth Circuit agreed when the Western District of Louisiana decided that Ms. Broussard's second lawsuit arose out of the same continuous pattern of sex discrimination and retaliation claimed in *Broussard I.* It rejected adjudging the second claim as arising from CITGO's retaliatory behavior against Connie Broussard for having filed *Broussard I.* Contrary to other circuits' findings, the Fifth Circuit considers both claims as a whole, as coming out of the same employment relationship, regardless of the nature of the second wrong and the time it occurred.

The various circuits have used different criteria in deciding what represents a different event or transaction when applying the res judicata doctrine. The United States Supreme Court should settle this matter.

II. Is amending the original complaint mandatory when new claims arise while the suit is pending?

The Fifth Circuit affirmed the Louisiana Western District finding that Connie Broussard should have requested leave to amend her initial petition, and that her failure to do so rendered the second suit to be barred.

USCS Fed.R.Civ.P.15 gives a party the opportunity to amend its initial petition with claims that arise during the course of the lawsuit. Although the language of the statute does not impose a mandatory duty of a party to amend its complaint, there have been continuous discrepancies in the way various circuits interpret this statute.

The Ninth Circuit stated, "The scope of litigation is framed by the complaint at the time it is filed. The rule that a judgment is conclusive as to every matter that might have been litigated 'does not apply to new rights acquired pending the action...'." *Los Angeles Branch NAACP v. Los Angeles Unified School Dist.* 750 F.2d 731, 739 (9th Cir., 1984). Although plaintiffs may amend the original complaint to include claims that arise during the suit, this procedure is not mandatory in order for the plaintiffs to maintain their rights. *Id.* at 740. The Ninth Circuit goes even further and states that "...a requirement that every claim arising prior to entry of a final decree must be brought into the pending litigation or lost" would not work. *Id.*, at 740. In Connie Broussard's case, however, the Fifth Circuit thinks the exact opposite, finding that Connie Broussard lost her right to recover for the violation of her rights during the May 16, 2001 meeting and by the subsequent discharge due to her failure to amend her complaint in *Broussard I.* This, in effect, nullifies her prescriptive and investigative rights pursuant to Title VII and EEOC guidelines, *Griffin v. City of Dallas*, 26 F. 3d 610, 612

(5th Cir. 1994); *Urrutia v. Valero Energy Corp.*, 841 F.2d 123, 126 (5th Cir. 1988).

In contrast with the Ninth Circuit, the Sixth Circuit states that plaintiff's failure to amend its original complaint triggers the application of res judicata. *Hapgood v. City of Warren*, 127 F.3d 490, 494 (6th Cir., 1997), citing Brannan v. Fowler, 100 Ohio App. 3d 577, 654 N.E.2d 434, 437 (Ohio Ct. App. 1995) "failure to amend could lead to future defense of res judicata."

The Eleventh Circuit agrees that res judicata is to be applied to claims that "...should have been brought in an earlier case" but, at the same time, it is not the res judicata doctrine that establishes which claims should, and which claims should not, have been brought in the earlier case. Manning v. Auburn, 953 F.2d 1355, 1360 (11th Cir., 1992). The court goes on to say that "...res judicata creates no absolute duty to supplement a complaint..." and that plaintiff has a choice to amend the petition or to bring a separate suit. *Id.*, at 1360.

The Second Circuit, in Computer Assocs. Int'l v. Altai, Inc., 126 F.3d 365, 369, 370 (2d Cir., 1997), citing SEC v. First Jersey Sec., 101 F.3d 1450, 1463-64 (2d Cir. 1996), states that a plaintiff may seek leave of court to amend the original complaint. He is not, however, obligated to do so in order to keep his rights.

By contrast, *Marquez v. Bridgestone/Firestone, supra*, applying Eighth Circuit principles, ruled that plaintiff's second suit was precluded because she had not amended the complaint in her pending suit. This was so despite the fact that the plaintiff's retaliatory discharge occurred after the original employment discrimination claim was filed.

The split among the circuits regarding the mandatory nature of amending a complaint, when it involves claims that were not available at the time the first complaint was filed, warrants that the United States Supreme Court grant this petition of writ of certiorari.

CONCLUSION

It is clear that res judicata applies to claims that were raised or could have been raised, in a prior action between the same parties. It is not clear, however, whether a wrong that occurs pending the action is to be considered as a claim derived from the same transaction, the employment relationship between the parties, or as a new claim deriving from a different transaction. Here Connie Broussard's discharge came in retaliation for her lawsuit. Circuits have been expressing different opinions as to what represents a different event or transaction when the second claim is not available at the time the first one is filed. Because of the split among circuits and the importance of the issue, the United States Supreme Court should grant this writ in order to settle the matter.

Another issue that the circuits do not agree on is whether a plaintiff must amend the complaint with any claim that arises pending the litigation, or whether the new claim can be brought in a separate action. Some circuits say that amending the original petition is the only option that a plaintiff has in order to bring a new claim. Other circuits say that amending the complaint is mandatory only as to the claims that existed at the time the complaint was filed. As for the claims that arose afterwards, those circuits say that a plaintiff may either bring them in an amended complaint or

file them in a separate lawsuit. This writ should be granted in order to resolve this inconsistency in federal law.

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRUIT

No. 04-30387
Summary Calendar

CONNIE BROUSSARD; ET AL.,

Plaintiffs,

CONNIE BROUSSARD

Plaintiff-Appellant,

versus

CITGO PETROLEUM CORP.,

Defendant-Appellee.

Appeal from the United States District Court for
the Western District of Louisiana
(USDC No. 04-30387)

Before REAVLEY, BARKSDALE and GARZA, Circuit Judges.

PER CURIAM:*

The district court properly dismissed Broussard's claims as res judicata requires that these claims could and should have been adjudicated in the prior proceeding. United States v. Shanbaum, 10 F.3d 305, 310 (5th Cir. 1994); Woods Exploration and Producing Co. v. Aluminum Co. of America, 438 F.2d 1286, 1312-13 (5th Cir. 1971).

AFFIRMED.

* Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF LOUISIANA

LAKE CHARLES DIVISION

CONNIE BROUSSARD **VERSUS** **CITGO PETOLEUM CORPORATION**	**CIVIL ACTION NO. CV01-1399** **JUDGE TRIMBLE** **MAGISTRATE JUDGE WILSON**

MEMORANDUM RULING

Presently before the court is a Motion for Summary Judgment pursuant to Fed.R.Civ.P.56 [doc. #38] by Defendant CITGO Petroleum Corporation ("CITGO"), on grounds that Plaintiff Connie Broussard's ("Broussard")[1] claims of sex discrimination, retaliation, intentional infliction of emotional distress and false imprisonment are either barred by res judicata principles, fail as a matter of law, or are preempted by § 301 of the Labor Management Retaliations Act.

For the following reasons we grant the motion for summary judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Connie Broussard unsuccessfully sued CITGO, in June 1999, ("*Broussard I*") alleging under state law a long-standing patter of employment discrimination and

[1] The Court dismissed DARRELL Kent Gamble's claims against CITGO on September 17, 2003.

retaliation. In *Broussard I,* this Court found no support for her allegations, and granted summary judgment in favor of CITGO on August 24, 2001. While *Broussard I* was pending, Plaintiff filed this suit on July 25, 2001, alleging the same long-standing pattern of discrimination and retaliation in terms of Title VII violations and a claim of false imprisonment.

During *Broussard I,* Plaintiff alleged that CITGO had engaged in an eight-year pattern of sex discrimination and retaliation including, among other things, denying Broussard training and a promotion to product inspector in late 2000. Broussard also claimed that CITGO's alleged pattern of systematically discriminating and retaliating against Broussard intentionally or negligently inflicted emotional distress upon her.

This Court granted summary judgment in *Broussard I* because most of Broussard's facts were simply assertions or conclusions stated by Plaintiff under oath, and Broussard simply recited the conclusions that she stated as facts, absent details or other acceptable evidence. This Court granted CITGO's motion for summary judgment and dismissed Broussard's claim with prejudice. The Fifth Circuit Court of Appeals affirmed this Court's judgment.

Before the Court had addressed the motion for summary judgment, Broussard filed this suit against CITGO on July 25, 2001. In addition to her "new" claims under Title VII, Broussard asserted that her termination on May 18, 2001, was additional proof of the same pattern of sex discrimination and retaliation alleged in *Broussard I.* Broussard also alleges that CITGO's pattern of conduct intentionally inflicted emotional distress on her, this time by "imprisoning" her in a meeting with CITGO representatives on May 16, 2001.

Defendant argues that Broussard's co-workers were complaining that Broussard was creating discord in the workplace. Defendant asserts that several of Broussard's co-

workers informed CITGO that Broussard was copying company documents for use in *Broussard I*. Thereafter, on May 16, 2001, CITGO employees conducted an interview with Broussard and her union representative to asses the validity of the information received from Broussard's co-workers. During this meeting, Broussard admittedly screamed, cursed, cried hysterically, and pounded her fists on a table so hard that she had to be escorted to the company medical facility. On May 18, 2001, CITGO terminated Broussard's employment as a result of her conduct at the meeting on May 16. CITGO argues that Broussard is attempting to re-litigate claims of sex discrimination, retaliation, and intentional infliction of emotional distress that were already dismissed in Broussard I, by re-urging the same facts as Title Vii violations and tacking on other facts, which occurred months before *Broussard I* was dismissed. The Court agrees.

SUMMARY JUDGMENT STANDARD

The Federal Rules of Civil Procedure provide for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law". Fed.R.Civ.P.56(c). The movant bears the initial burden of informing the court of the basis for its motion and identifying those portions of the pleadings, depositions and answers to interrogatories, admissions on file and affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Williams v. Adams*, 836 F.2d 958, 960 (5the Cir. 1988). Once a proper motion has been made, the non-moving party may not rest upon mere allegations or denials in the pleadings but

must set forth specific facts showing the existence of a genuine issue for trial. *Celotex Corp.*, 477 U.S. at 322-23; *Anderson*, 477 U.S. at 257; *Topolitan v. Ehrman*, 954 F.2d 1125, 1131 (5th Cir. 1992). Summary Judgment is mandated if the nonmovant fails to make a showing sufficient to establish the existence of an element essential to her case on which she bears the burden of proof at trial. *Celotex,* 477 U.S. at 322.

The Supreme Court notes that summary judgment may e an appropriate venue "to secure the just, speedy, and inexpensive determination" of a matter. *Celotex,* 477 U.S. at 327. Consistent with the concern for judicial economy, "the mere existence of a scintilla of evidence in support of the [non-moving party's] position" is insufficient to defeat a properly supported motion for summary judgment. *Anderson*, 477 U.S. at 252.

LAW AND ANALYSIS

Res Judicata and collateral estoppel relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and encourage reliance on adjudication by preventing inconsistent decisions. *Allen v. McCurry*, 449 U.S. 90, 94 (1980). Res judicata prohibits parties and their privies from raising any claim or defense in a later action that was or could have been raised in support of, or in opposition to the cause of action asserted in a prior action that was resolved by a final judgment on the merits. *See Nilsen v. City of Moss Point, Miss.*, 701 F.2d 556, 560 (5th Cir. 1983); *In re Intelogic Trace, Inc.*, 200 F.3d 382, 388 (5th Cir. 2000). The critical question for res judicata purposes is whether the party could or should have asserted the claim in the earlier proceedings. *Id.*

For res judicata to apply, the following four elements must be met. First, the parties in the subsequent action must be identical to, or in privity with, the parties in the prior

action. Second, the judgment in the prior case must have been rendered by a court of competent jurisdiction. Third, the prior action must have concluded with a final judgment on the merits. Finally, both suits must involve tha same claim or cause of action. *See Ellis v. Amex Life Ins. Co.*, 211 F.3d 935, 937 (5th Cir. 2000); *In re Southmark Corp.*, 163 F.3d 925, 934 (5th Cir. 1999).

In this case the first three elements for res judicata are easily met. First, it is undisputed that Broussard and CITGO were parties to *Broussard I*. Second, there is no dispute that this Court issued judgment in *Broussard I*, or that it had jurisdiction over the litigation and the parties. Third, there is no dispute that *Broussard I* concluded with a final judgment on the merits when this Court rendered judgment in favor of CITGO on August 24, 2001, and that after dismissal, Broussard appealed to the Fifth Circuit, which affirmed this Court's final judgment.

With respect to the final condition, whether the same claim or cause of action is involved in both suits, the Fifth Circuit applies a transitional test. *B.R. Eubanks, M.D. v. FDIC*, 977 F.2d 166, 171 (5th Cir. 1992). The Fifth Circuit has recognized that the critical issue is whether the two actions are based on the same "nucleus of operative facts". *Ellis*, 211 F.3d at 938 (quoting *Agrilectric Power Partners, Ltd. V. Gen. Elec. Co.*, 20 F.3d 663, 665 (5th Cir. 1994)). This inquiry requires the court to look at factual predicate of the claims asserted, not the legal theories upon which a plaintiff relies. *Id.* Applying this test, it is clear that this action is based on the same set of operative facts as *Broussard I*, that is, CITGO's alleged pattern of systematically discriminating and retaliating against Broussard. The last requirement for res judicata is therefore met.

Furthermore, in *Fleming v. Travenol Labs., Inc.*, the Fifth Circuit found that a plaintiff "could simply have amended her pending discrimination complaint and argued

the Title VII allegations in that suit" instead of filing a subsequent suit. *Fleming v. Travenol Labs., Inc.*, 707 F.2d 829 (5th Cir. 1983). The court also pointed out that the plaintiff instead chose to file "a second complaint while her original case was still pending." *Id.* The Fifth Circuit held that "when one has a choice of more than one remedy for a given wrong...he or she may not assert them serially, in successive actions, but must advance all at once on pain of bar." *Id.*

Broussard cannot contend that she was forced to bring a second lawsuit because she was denied leave of court to file an amended complaint in *Broussard I*. Broussard never requested leave of court to amend her complaint in *Broussard I*. Instead, she filed this suit more than a month before *Broussard I* was dismissed. Further, Broussard cannot argue that she was unable to amend her complaint because her claims arising out of the meeting on May 16, 2001, had not become ripe. It is well settled in the Fifth Circuit that "a district court has 'ancillary jurisdiction' to hear a claim of retaliation, even though not filed with the EEOC, 'when it grows out of an administrative charge that is properly before the court.'" *Barrow v. New Orleans S.S. Assoc.*, 932 F.2d 473, 479 (5th Cir. 1991). Therefore, Broussard cannot claim that she was deprived of the opportunity to plead all of her claims in one lawsuit. It is obvious that Broussard could have expressly included her discharge and false imprisonment allegations in *Broussard I*.

Broussard was terminated on May 18, 2001, while CITGO's summary judgment motion was pending before the Court. The Court did not dismiss *Broussard I* until August 24, 2001, more than three months after Broussard had been terminated. Indeed, Broussard filed, but did not serve, this suit in July 2001, while *Broussard I* was pending. Because Broussard failed to seek leave to amend her pleadings to include the discharge and false imprisonment claims in *Broussard I*, she is barred from bringing them now.

CONCLUSION

For the foregoing reasons, CITGO's Motion for Summary Judgment [doc. #38] will be GRANTED. Further, CITGO's request for attorneys' fees and costs will be DENIED.

THUS DONE AND SIGNED in Chambers at Lake Charles, Louisiana, this 30th day of March, 2004.

/s/
JAMES T. TRIMBLE, JR.
UNITED STATES DISTRICT JUDGE

STATUTES

USCS Fed. R. Civ. P. 15-Amended and Supplemental Pleadings

(a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(c) Relation Back of Amendments. An amendment of a pleading relates back to the date of the original pleading when

(1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or

(2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or

(3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

The delivery or mailing of process to the United States Attorney, or United States Attorney's designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of subparagraphs (A) and (B) of this paragraph (3) with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

(d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statements of a claim for

relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.